United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: December 15, 2015

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bayhealth Medical Center
Case 05-CA-157145

Weingarten Chron
506-4033-3000
512-5072-2400

This case was submitted for advice as to whether it is an appropriate vehicle in which to urge the Board to overrule *IBM Corp.*[1] and to recognize employees' *Weingarten*[2] rights in non-unionized settings, and if so, what the remedy should be.[3] We conclude that the Region should use this case as a vehicle to urge the Board to extend *Weingarten* rights to unrepresented employees and find that the Employer violated Section 8(a)(1) by forcing the Charging Party to participate in an investigatory interview without the assistance of a coworker. In addition, we conclude that the appropriate remedy in this case is make-whole relief because the Employer contends that the Charging Party was discharged, in part, for misconduct that occurred during the interview.

FACTS

The Charging Party was employed as a registered nurse in the emergency department at Bayhealth Kent General, one of Bayhealth Medical Center's

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[1] 341 NLRB 1288 (2004).

[2] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] The Region has already decided to issue complaint, absent settlement, alleging the Charging Party was unlawfully discharged based on [redacted] protected concerted activities and the Employer's mistaken belief that [redacted] was engaged in union activities. The Region also concluded that the Employer unlawfully interrogated the Charging Party and made coercive statements during its investigative interview.

("Employer") affiliated hospitals, until [redacted] termination on [redacted] 2015.[4] The nursing staff is not represented by a union.

The Employer follows a "shared governance" practice model, wherein staff and management are supposed to collaborate and share decision-making and accountability for patient care, safety, and work life. Notwithstanding this collaborative model, the Employer repeatedly rejected the Charging Party's individual attempts to raise operational complaints and ideas about improving the emergency department in recent years. In raising these issues, the Charging Party was motivated not only by patient care concerns, but also staff safety and concern that these safety issues might pose a risk to [redacted] nursing license.

During a shared governance meeting in February, the Employer permitted staff to meet without the presence of managers. At this meeting, the Charging Party discovered that other staff shared many of [redacted] concerns about the emergency department, in addition to other concerns. Specifically, employees raised issues related to staffing, nursing recruiters, assignment sheets, equipment, vacations, educational accommodations, and uniforms.

Realizing that shared governance might provide a mechanism to pursue desired changes, the Charging Party volunteered to assist the nurse chair of the committee and over the next few weeks set about uniting the staff around common complaints. On [redacted] the Charging Party emailed the nursing and hourly staff to encourage them to coalesce around a few issues to present to management, noting that nurses bear responsibility for assessing department needs and providing solutions since managers are not practitioners. [redacted] created an email distribution list so that employees could communicate amongst themselves. [redacted] developed and distributed to employees an informal grievance form to be used to document employees' individual and group complaints and management's responses. In an email to staff on [redacted] in which the Charging Party referred to [redacted] as a [redacted] outlined a new framework for shared governance. Specifically, [redacted] presented a structure for running the meetings (allocating time for a management speaker, a guest speaker, and discussion of agreed-upon topics of concern) and proposed a schedule and system for soliciting employee concerns and voting on which issues to submit to management. The Charging Party believes that another employee shared this [redacted] email with the Employer.[5] The following day, the Employer sent an

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[4] All dates hereafter are in 2015, unless otherwise noted.

[5] In any event, the Employer's managers admit that they knew about some of the Charging Party's emails. In fact, the Employer submitted [redacted] email as evidence to the Region. They mistakenly characterize the content of [redacted] messages as discussing getting nurses together to vote and bargain and excluding management from shared governance.

email informing staff that it would give an educational presentation on what the shared governance model is at the next meeting.

Frustrated by management's attempt to regain control of the shared governance process, the Charging Party emailed the staff to announce [redacted] resignation from shared governance and to inform them that [redacted] would submit grievances as an individual rather than as a group. On [redacted] emailed [redacted] supervisor and the director of the emergency department announcing that [redacted] would start documenting requests for changes using the grievance form [redacted] created due to management's failures to address earlier concerns. [redacted] also referred to a refusal-of-assignment form that [redacted] had created about two years ago to document instances where the assignment load created an unsafe situation for patients, and suggested that [redacted] might use it again as a complement to the grievance form. That same day, [redacted] submitted two grievances to [redacted] supervisor concerning staffing issues. [redacted] indicated that all in the department shared the grievances, but that [redacted] was submitting them solely on behalf of [redacted] noted that it was up to others whether they concurred with [redacted] concerns.

Later that day, the emergency department director informed the Charging Party that [redacted] presence would be required at a meeting with human resources on [redacted][6] When the Charging Party inquired about the purpose of the meeting, [redacted] was informed that it was about patient complaints and other unspecified issues in the department. Typically, if a supervisor is uncertain about how to handle a patient complaint, a human resources representative conducts an investigation and solicits the employee's side of the story before deciding whether discipline is warranted. The Employer refused to supply the Charging Party with the names of the patients who lodged complaints in advance of the meeting. In denying [redacted] request for this information, the Vice President of Human Resources allegedly told the Charging Party that the hospital does not provide information to employees when it is "building a case" against them.[7] The Employer's human resources representatives uniformly contend that no corrective action had been decided upon prior to the meeting. The Corrective Action Record likewise notes that the meeting was scheduled as a "conversation only" and that there was no intention to issue corrective action prior to the meeting.

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[6] It is unclear when the Employer made the decision to hold this meeting. One email suggests it was on or before [redacted], but the Vice President of Human Resources indicated that the meeting was called when [redacted] learned of patient complaints just a few days before the meeting.

[7] The Vice President of Human Resources contends that [redacted] merely told the Charging Party that the hospital was conducting an investigation into patient complaints.

The Charging Party asked another nurse to accompany [redacted] to the meeting in case the meeting resulted in corrective action. When the pair arrived at the meeting, the Employer refused to allow the Charging Party's coworker to attend, citing hospital policy. The Employer did not give the Charging Party the option of abstaining from the meeting.

The [redacted] meeting was attended by four Employer representatives: the Charging Party's supervisor, the director of the emergency department, the HR Vice President, and another HR manager. The meeting began with a brief discussion of patient complaints. One concerned an accusation that the Charging Party yelled at a patient during her emergency room visit; the other involved a mother's concern that more wasn't done for her son at the emergency room. The Charging Party requested time to review the patient charts before responding to the allegations, which the Employer representatives agreed to.

The meeting then turned to the Charging Party's recent emails to the staff. Employer representatives questioned the appropriateness of [redacted] communications about shared governance and asserted that it was a violation of policy to report safety issues using an unapproved grievance form rather than the Employer's variance report. The Charging Party defended [redacted] emails as being within [redacted] federal rights and asserted that [redacted] actions were intended to promote patient care and staff safety and to protect [redacted] license. In the course of this discussion, the Charging Party stated to the emergency department director that [redacted] couldn't do [redacted] job and [redacted] couldn't do [redacted] The director told [redacted] was out of line, and [redacted] apologized for the comment. At one point in the meeting, the Charging Party asserted [redacted] right to a "steward" and the HR Vice President asked whether [redacted] had worked in a union shop. [redacted] chastised [redacted] for using union terminology and accused [redacted] of acting as if the hospital were unionized in [redacted] efforts to address patient safety issues. When the Charging Party stated that [redacted] was anti-union and denied trying to start a union, [redacted] expressed disbelief. Toward the end of the meeting, the Charging Party challenged management's assertion that human resources was an advocate for employees, noting the HR Vice President's statement prior to the meeting that the hospital was building a case against [redacted] denied making that statement, and the Charging Party responded in a raised voice, "either I am a liar or you are a liar." [redacted] then reminded [redacted] that [redacted] prior suspension for letting [redacted] license lapse[8] was still active in [redacted] personnel file and informed [redacted] was terminated.

The Corrective Action Record documenting the Charging Party's discharge states three reasons for [redacted] termination. Primarily, it relies upon the "inappropriate outburst" at the [redacted] meeting, i.e. [redacted] raised voice, [redacted] "verbally combative,"

[8] According to the Charging Party, [redacted] was suspended in 2013 for letting [redacted] license lapse for one day.

"condescending and demeaning" remarks to management, and [redacted] exclamation that either the HR Vice President was lying or [redacted] was. Additionally, the disciplinary notice cites [redacted] "consistent failure to hold [redacted] accountable for insubordinate behavior," i.e. [redacted] emails about changing the shared governance meeting and implementing the grievance form and refusal-of-assignment form without management approval. And finally, the notice mentions the Charging Party's "clear violation of [Employer] policies," i.e. implementing the grievance form to document safety issues in lieu of the variance reporting system. The Corrective Action Record notes that termination was the next step pursuant to the Employer's progressive discipline policy, since [redacted] had an active suspension on file. It also notes that the Charging Party had previously been disciplined for sending emails rebutting [redacted] manager's direction, specifically for replying all to an email announcing a new patient assessment policy and criticizing it as infeasible.

The Charging Party appealed [redacted] termination using an internal appeal process, but the Employer upheld [redacted] termination. [redacted] also sent a letter to the CEO informing [redacted] of department issues and protesting [redacted] termination. During the course of the Charging Party's unemployment compensation proceeding, the Employer learned that [redacted] recorded the [redacted] meeting in violation of hospital policy.[9] The Employer asserts that this constitutes misconduct warranting termination, notwithstanding that state law apparently permits recordings in such circumstances.[10]

ACTION

We conclude that the Region should use this case as a vehicle to urge the Board to overrule *IBM Corp.*[11] and find that the Employer violated Section 8(a)(1) by requiring the Charging Party to attend the human resources meeting without the assistance of a coworker. In addition, we conclude that the appropriate remedy for this violation is make-whole relief, since the Employer based its discharge decision, in part, on the Charging Party's behavior at the investigatory interview.

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[9] The use of recording devices is prohibited under Section 5 of the Employer's corrective action policy, entitled "General Guidelines Regarding the Application of Corrective Actions."

[10] *See* DEL. CODE ANN. tit. 11, § 2402(c)(4) (stating that it is lawful for a person to intercept an oral communication where the person is a party to that communication, and the interception is not for the purpose of committing a criminal or tortious act).

[11] 341 NLRB 1288 (2004).

Legal Background

In *Weingarten*, the Supreme Court upheld the Board's rule that employees have the right to refuse to submit to an interview without a union representative if the employee reasonably believes it may result in discipline.[12] In upholding the Board's policy, the Court found that the "right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection[,]"[13] and further, that an employee request for a union representative at an investigatory interview "clearly falls within the literal wording of § 7."[14] It explained that although the employee may be the only one with an "immediate stake" in the matter, such a request is encompassed within the "mutual aid or protection" clause because: (1) the union representative safeguards the whole bargaining unit's interest in preventing unjust punishment; and (2) [redacted] presence assures other employees that they too can avail themselves of such a representative should they find themselves in similar circumstances.[15] With respect to this latter point, the Court cited with approval Judge Learned Hand's observation in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*[16] that:

> [w]hen all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.[17]

The *Weingarten* Court found that the Board's construction was not only faithful to the statutory text, but that it effectuated the purposes of the Act by attempting to eliminate the "'inequality of bargaining power between employees . . .

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[12] 420 U.S. at 256, 260.

[13] *Id*. at 256.

[14] *Id*. at 260.

[15] *Id*. at 260-61.

[16] 130 F.2d 503 (2d Cir. 1942).

[17] 420 U.S. at 261 (quoting *Peter Cailler Kohler Swiss Chocolates*, 130 F.2d at 505-06).

and employers.'"[18] The Court also noted that the Board's rule benefitted employers as well as employees.[19] In this regard, a lone employee may be "too fearful or inarticulate" to accurately describe the underlying incident or "too ignorant" to point out extenuating circumstances, whereas a "knowledgeable" union representative could benefit the employer by drawing out favorable facts and helping to get to the bottom of the incident, thereby saving production time.[20] Finally, the Court observed that the statutory right was consistent with actual industrial practice, as demonstrated by its incorporation in many collective-bargaining agreements and its recognition by arbitral authority.[21]

The Board first directly addressed the applicability of the *Weingarten* right to a non-union setting in *Materials Research Corp.*,[22] finding that unrepresented employees enjoyed a similar right to have a fellow employee present at an investigatory interview. The Board principally relied upon the fact that this right emanates from Section 7, as recognized by the Supreme Court in *Weingarten*, and that Section 7's protections do not vary based on whether the employee involved is represented by a union, with very limited exceptions.[23] The Board further explained that a request for a coworker's assistance in a non-union setting satisfies the elements under Section 7. It is "concerted activity—in its most basic and obvious form—since employees are seeking to act together."[24] And it is conduct undertaken for "mutual aid or protection," notwithstanding that a coworker does not safeguard the interests of the broader workforce, since by such a request "all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances."[25] Thus, in the Board's view, the Supreme Court's framing of the *Weingarten* right as the right to the assistance of a "union representative" simply reflected the fact pattern presented to the Court in that case

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[18] *Id.* at 261-62 (quoting 29 U.S.C. § 151).

[19] *Id.* at 262.

[20] *Id.* at 262-63.

[21] *Id.* at 267.

[22] 262 NLRB 1010 (1982).

[23] *Id.* at 1011-12.

[24] *Id.* at 1015.

[25] *Id.*

rather than an indication that the Court intended to limit employees' rights to the union setting.[26]

In addition, the *Materials Research* decision observed that unrepresented employees would benefit from a coworker representative in ways similar to those the Court recognized for organized employees. Thus, the imbalance of power between employers and employees is present in both union and non-union settings, and the mere presence of a coworker as a witness can help prevent the employer from overpowering a lone employee.[27] Indeed, unrepresented employees may be even more dependent upon coworker solidarity to combat unjust or arbitrary employer action in the Board's view, since they do not have the benefit of a collective-bargaining agreement or a grievance-arbitration process.[28] The Board recognized that an unrepresented employee may be too "fearful" or "inarticulate" to describe the incident being investigated, or too "ignorant" to raise extenuating factors and thus adequately defend (b) (6), (b) (7)(C) perhaps even more so than a represented employee given (b) (6), (b more vulnerable employment circumstances—and that a coworker would be capable of performing the limited tasks required of a *Weingarten* representative, i.e. eliciting helpful facts and getting to the bottom of the incident.[29] In addition, the Board recognized that a coworker can lend valuable moral support and that his mere presence as a witness militates against unjust or arbitrary action since (b) (6), can relay any signs of employer wrongdoing to other employees.[30] Significantly, regardless of the efficacy of such a representative, the Board expressed its unwillingness to substitute its judgment for that of employees facing discipline who believe that the presence of a coworker lends a measure of meaningful protection.[31]

Finally, the Board in *Materials Research* noted that granting unrepresented employees access to a coworker is unlikely to interfere any more with operations than permitting access to a union representative in an organized workplace. The *Weingarten* right is only triggered by investigatory interviews and the employer

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[26] *Id.* at 1012.

[27] *Id.* at 1014-15.

[28] *Id.* at 1014.

[29] *Id.* at 1015.

[30] *Id.*

[31] *Id.* ("It is for the employee himself to determine whether the presence of a coworker at an investigatory interview provides some measure of protection.").

may schedule the interview so as not to disrupt production.[32] Moreover, an employer may actually benefit from the presence of a coworker, who may be able to assist in resolving the investigation expeditiously.[33] And, the Board underscored, an employer's hands are not tied when an employee invokes the right to coworker assistance, since the employer need not undertake the interview if it so chooses and it is free to discipline based on other information gleaned during the investigation.[34]

After following *Materials Research* in several subsequent cases,[35] just a few years later the Board reversed course, concluding that the Act compelled the opposite conclusion. In *Sears, Roebuck and Co.*,[36] the Board reasoned that extending the *Weingarten* right to unrepresented employees was an impermissible construction of the Act because it would require an employer to "deal with" the equivalent of a union representative in derogation of the statute's exclusivity principle.[37] After the Third Circuit rejected this premise in a subsequent case,[38] the Board in *DuPont IV*[39] conceded that *Materials Research* reflected a permissible construction of the Act, but again refused to apply *Weingarten* to the non-union setting.[40] This time, the Board justified its denial of such rights based on a balancing of labor's and management's interests.[41] The Board reasoned that unrepresented employees' Section 7 interests were "less numerous and less

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[32] *Id*.

[33] *Id*.

[34] *Id*. at 1015-16.

[35] *See, e.g.*, *E. I. DuPont de Nemours (DuPont I)*, 262 NLRB 1028 (1982); *E. I. DuPont de Nemours & Co. (DuPont II)*, 262 NLRB 1040 (1982); *Valley West Welding Co.*, 265 NLRB 1597, 1599 (1982).

[36] 274 NLRB 230 (1985).

[37] *Id*. at 231-32.

[38] *Slaughter v. NLRB*, 794 F.2d 120, 122 (3d Cir. 1986), *denying enforcement to E. I. DuPont de Nemours (DuPont III)*, 274 NLRB 1104 (1985).

[39] *E. I. DuPont & Co. (DuPont IV)*, 289 NLRB 627 (1988), *enforced*, 876 F.2d 11 (3d Cir. 1989).

[40] *Id*. at 628.

[41] *Id*. at 628, 630.

weighty" than the interests of represented employees when measured against certain factors referenced in *Weingarten* itself.[42] And it found that the interests of both labor and management would be better served by withholding *Weingarten* rights from unrepresented employees, noting that such a right could work to the disadvantage of employees since they might lose their only opportunity to tell their side of the story.[43]

In *Epilepsy Foundation of Northeast Ohio*,[44] the Board once again reversed course and overruled *Dupont IV*, citing "compelling considerations"—namely that the existing rule infringed on employees' Section 7 rights and was inconsistent with the rationale underlying *Weingarten* and the purposes of the Act.[45] The Board reasoned that unrepresented employees should be entitled to representation at investigatory interviews since the Supreme Court grounded the right to assistance in Section 7's protection of concerted activities for mutual aid or protection, that clause generally protects employees acting together to address unjust punishment, and Section 7's guarantees are applicable to all employees and are not dependent on union representation.[46] It found that bestowing a right to assistance on unrepresented employees "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'"[47] In re-adopting this right, the Board observed that Section 7 rights do not turn on employee skills or motives.[48] It also found speculative *Dupont IV*'s observation that extending *Weingarten* rights might work to the detriment of unrepresented employees, and stated that it preferred to let employees decide for themselves whether calling upon a coworker for aid would be strategically advantageous.[49]

Epilepsy Foundation expressly rejected the contention raised in *Sears* that conferring a *Weingarten* right on unrepresented employees clashes with provisions

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[42] *Id*. at 629-30.

[43] *Id*. at 630.

[44] 331 NLRB 676 (2000), *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001).

[45] *Id*. at 677, 678 n.8.

[46] *Id*. at 677-78.

[47] *Id*. at 678 (quoting *Weingarten*, 420 U.S. at 260-61).

[48] *Id*. at 679.

[49] *Id*.

of the Act that enable a non-union employer to "deal with employees on an individual basis."[50] The Board concluded that while employers are generally free to deal with employees individually where there is no union present, employers may not assert this right as a means of obstructing employees' Section 7 right to act together to prevent unjust punishment.[51] Likewise, the Board rejected the related argument that coworker representation conflicts with the exclusivity principle under Section 9(a) by forcing an employer to "deal with" the equivalent of a labor organization. As the Board explained, the exclusivity principle is inapplicable in a non-union setting, and in any event, an employer is free to forego the interview, and thus there is no obligation to deal with an employee representative of nonunionized employees.[52]

The *IBM Corp.* Decision

Less than four years later, the Board reversed course yet again in *IBM Corp*. Although a majority of the Board believed that *Epilepsy Foundation* was a permissible construction of the Act, a different majority determined that unrepresented workers should not enjoy *Weingarten* rights because policy considerations necessitated that employers be allowed to conduct investigations in a "thorough, sensitive, and confidential manner."[53] To justify this change in law, the Board majority cited a heightened need for employers to conduct investigations in the decades since *Weingarten* as a result of new employment laws (particularly those banning discrimination and harassment), a rise in workplace violence and corporate abuse, and new security concerns raised by the terrorist attacks of September 11, 2001, a sign of the "troubled times in which we live."[54]

The *IBM* majority articulated four broad policy concerns weighing against conferring *Weingarten* rights on unrepresented employees, largely echoing points raised in *DuPont IV* and other prior opinions. First, it observed that coworkers do not have a legal duty or personal incentive to represent the interests of the entire

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[50] *Id*. at 678.

[51] *Id*.

[52] *Id*. at 678-79.

[53] 341 NLRB at 1289-90. Member Schaumber concurred fully with the policy considerations advanced in the plurality opinion of Chairman Battista and Member Meisburg. *Id*. at 1295. For this reason, we refer to the plurality opinion as the *IBM* majority.

[54] *Id*. at 1290-91, 1294.

workforce, whereas a union representative is legally bound to safeguard the interests of the whole bargaining unit.[55] Second, coworkers who are selected as representatives on an ad hoc basis cannot redress the imbalance of power between employers and employees, whereas union representatives are backed by the collective force of the bargaining unit and have knowledge of the workplace and its politics, and can thereby aid in developing consistent practices and improve the speed and efficiency of investigations.[56] Third, coworkers lack the skills, knowledge, and experience that union representatives have to facilitate the interview and propose solutions to workplace issues, and are therefore less useful to both the employee being interviewed and the employer.[57] The majority viewed coworker representatives as primarily being able to lend moral and emotional support rather than as capable of advancing the fact-finding mission.[58] It also raised the concern that coworkers might be more disruptive because of their personal connection to the employee being investigated and the potential that the representative might be a coconspirator in the incident under investigation.[59]

Fourth, the *IBM* majority raised concerns surrounding confidentiality, injecting a new policy consideration into the long-running debate over *Weingarten* rights for unrepresented employees.[60] In this regard, the Board noted that investigations in the workplace are a "relatively new fact of industrial life" and often touch upon sensitive and personal subjects.[61] Accordingly, a promise of confidentiality may be necessary to elicit candid answers from witnesses, protect the reputation of the employee under investigation, encourage those with information to come forward, and maintain the integrity of the investigation in cases where there is a need to conceal the fact of the inquiry or the substance of the questions.[62] In the majority's view, the risk of a confidentiality breach is lower when the interview assistant is a union representative as compared to an ordinary

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[55] *Id*. at 1291-92. *See also DuPont IV*, 289 NLRB at 629.

[56] 341 NLRB at 1292. *See also DuPont IV*, 289 NLRB at 629; *Sears*, 274 NLRB at 234 (Member Hunter, concurring).

[57] 341 NLRB at 1292. *See also DuPont IV*, 289 NLRB at 629-30.

[58] 341 NLRB at 1292.

[59] *Id*. *See also Materials Research*, 262 NLRB at 1021 (Member Hunter, dissenting).

[60] 341 NLRB at 1292-93.

[61] *Id*. at 1293.

[62] *Id*.

employee because the union representative is bound by the duty of fair representation and has an interest in maintaining an "amicable relationship" with the employer.[63]

In addition to these four enumerated policy considerations, the Board majority in *IBM* also argued that *Epilepsy Foundation* should be overruled because it failed to take into account the fact that non-union employers are free to deal with employees on an individual basis.[64] The Board considered this to be the "critical difference" between union and non-union settings under "national labor policy."[65] In its view, allowing employees to avail themselves of the assistance of a coworker, in effect, forbids employers from dealing with employees individually and conflicts with this "historic distinction."[66] For this additional policy reason, the Board majority declined to follow *Epilepsy Foundation*.

The majority opinion in *IBM* drew a sharp dissent from Members Liebman and Walsh.[67] The dissenting opinion faulted the majority's conclusion that unrepresented employees' Section 7 rights must always yield to employers' interest in conducting effective investigations.[68] In the dissenters' view, the majority failed to adequately explain why the presence of a union representative (who is more skilled and backed by the power of union solidarity) posed *less* of a threat to employer interests than a mere coworker representative.[69] To the extent there are legitimate employer concerns in non-union settings, the dissent advocated taking them into account by adopting a presumptive right to representation, which an employer could rebut in appropriate circumstances[70]—an approach the majority

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[63] *Id*.

[64] *Id*. at 1292, 1294-95. *See also Epilepsy Foundation*, 331 NLRB at 683 (Member Hurtgen, dissenting); *Sears*, 274 NLRB at 231; *Materials Research*, 262 NLRB at 1019 (Chairman Van de Water, dissenting).

[65] 341 NLRB at 1292.

[66] *Id*. at 1292, 1295.

[67] In addition to countering the arguments made by the majority, the dissent also refuted Member Schaumber's concurrence, which strongly implied that recognition of *Weingarten* rights for unrepresented employees is an impermissible construction of the Act. *Id*. at 1307-08 (Members Liebman and Walsh, dissenting).

[68] *Id*. at 1309 (Members Liebman and Walsh, dissenting).

[69] *Id*.

[70] *Id*. at 1309-10 (Members Liebman and Walsh, dissenting).

dismissed because it would spawn extensive litigation and leave parties uncertain about the scope of the right.[71]

The dissent also dismissed each of the majority's policy justifications, and raised a new policy consideration in favor of *Weingarten* rights for unrepresented employees. As to the first three policy concerns—safeguarding the interest of all employees, redressing the imbalance of power, and effectiveness of representatives in facilitating the investigation—the dissent echoed *Epilepsy Foundation*'s observation that Section 7 rights do not depend on the skills or motives of the *Weingarten* representative.[72] As to the majority's concern for confidentiality, the dissent observed that this consideration is not unique to the non-union workplace, and that the majority was wrong to suggest that the duty of fair representation, which runs to employees, would serve the employer's interest in confidentiality.[73] With respect to the freedom to deal with employees on an individual basis, the dissent asserted that *Epilepsy Foundation* properly dismissed the argument—likewise rejected by the Third Circuit and D.C. Circuit—that recognizing a right to coworker representation forces an employer to deal with the equivalent of a labor organization in derogation of the exclusivity principle.[74] Finally, the dissent noted that the increasing prevalence of alternative dispute resolution (ADR) mechanisms in non-union workplaces reflected an "evolving norm of fairness and due process" and weighed in favor of granting *Weingarten* rights to unrepresented employees[75]—a consideration the majority considered unavailing because ADR is a voluntary system and should not be imposed by "governmental fiat."[76]

Analysis

We conclude that the Board should be given an opportunity to revisit this issue because *Materials Research* and *Epilepsy Foundation* better comported with

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[71] *Id*. at 1295.

[72] *Id*. at 1308 (Members Liebman and Walsh, dissenting).

[73] *Id*. at 1309 (Members Liebman and Walsh, dissenting).

[74] *Id*. at 1308-09 (Members Liebman and Walsh, dissenting) (citing *Slaughter v. NLRB*, 794 F.2d at 127, and *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d at 1101-02).

[75] *Id*. at 1310 (Members Liebman and Walsh, dissenting).

[76] *Id*. at 1295.

the Act and the *Weingarten* decision than *IBM*, which rests on faulty assumptions and is out of step with current Board precedent.

1. *IBM* infringes on employees' Section 7 rights and is inconsistent with the policies of the Act and the *Weingarten* rationale

Granting coworker representation to unrepresented employees in investigative interviews is not only a permissible construction of the Act,[77] it better effectuates the purposes of the Act and the rationale underlying the Supreme Court's decision in *Weingarten*. As the Board explained in *Materials Research* and *Epilepsy Foundation*, the Supreme Court expressly grounded the right to representation in employees' Section 7 right to engage in concerted activities for mutual aid or protection. An unrepresented employee's utilization of a fellow employee for assistance satisfies the required elements for protected concerted activity.[78] And such a right "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'"[79] Thus, the rationale underpinning *Weingarten* is equally applicable to unrepresented employees. In addition, extending protection to unrepresented employees better comports with the long recognized principle that Section 7 rights apply to unrepresented employees.[80]

Not only does an employee's request for assistance satisfy the required elements of "concert" and "mutual aid or protection," but granting coverage in these circumstances better comports with Board precedent granting Section 7 protection to a broad scope of activities. In this regard, mere discussions among employees about job security, a "vital term and condition of employment," are protected under Section 7 as "inherently concerted" conduct.[81] This is so even if group action is

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[77] *See id.* at 1289; *DuPont IV*, 289 NLRB at 628.

[78] *See Materials Research*, 262 NLRB at 1015 ("[A] request for the assistance of a fellow employee is also concerted activity—in its most basic and obvious form—since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances 'as nobody doubts.'")

[79] *Epilepsy Foundation*, 331 NLRB at 678 (quoting *Weingarten*, 420 U.S. at 260-61).

[80] *See id*. *See also Materials Research*, 262 NLRB at 1012 & nn.15-16 (citing Board and court cases for this principle).

[81] *See Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3-5 (Dec. 14, 2012) (holding employee conversations about job security to be inherently concerted and finding therefore that employer violated Section 8(a)(1) by discharging an employee

"nascent or not yet contemplated."[82] Thus, it would be anomalous to find that an employee has no Section 7 right to obtain help from a fellow employee when facing the possibility of discharge, but the same employee has a Section 7 right to merely discuss job security with a coworker.

In addition, the first policy consideration that the *IBM* majority cited as weighing against granting a *Weingarten* right to unrepresented employees—the fact that coworkers do not represent the interests of the whole workforce—is in tension with judicial and Board precedent based on the solidarity principle. As the *IBM* dissent noted, "[t]his notion of solidarity, of course, is basic to the Act."[83] Indeed, in *Weingarten,* the Supreme Court explicitly endorsed the solidarity principle as an additional basis for Section 7 coverage of *Weingarten* requests.[84] The Board has recently reaffirmed that the mutual aid or protection element is satisfied by demonstrations of employee solidarity, i.e. when one employee supports another with respect to an issue that appears to only concern the latter employee, because in such circumstances there is an "implicit promise of future reciprocation."[85] When employees engage in concerted activities that are protected under this solidarity principle, it does not matter whether those acting in solidarity represent any other employee's interests. Likewise, they need not be under a legal duty or personally incentivized to safeguard others' interests for their actions to warrant protection. What matters is that an employee approached a coworker with "a concern *implicating the terms and conditions of their* employment and sought . . . help in pursuing it."[86] And, it is enough that one employee has made common

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who engaged in such a conversation with a coworker), *reaffirmed by* 362 NLRB No. 81 (Apr. 30, 2015).

[82] *Id.* at 3-4.

[83] 341 NLRB at 1306, n.12 (Members Liebman and Walsh, dissenting) (citing *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.,* 130 F.2d at 505).

[84] 420 U.S. at 261 ("Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.* . . . .").

[85] *See Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5-7 (Aug. 11, 2014) (holding that lone victim of sexual harassment who approached coworkers to solicit their support as witnesses to report an incident to management was engaged in protected concerted activity).

[86] *Id.,* slip op. at 7 (emphasis in original).

cause with another; the employee's subjective motive is irrelevant.[87] Thus, *IBM*'s policy concerns in this regard are misplaced.

2. *IBM* conflates the efficacy of the right with the right itself

The second and third policy considerations relied on by the *IBM* majority—that coworkers are less capable of redressing the imbalance of power and of offering constructive assistance than union representatives—are likewise uncompelling. As the Board explained in *Materials Research*, the role of a *Weingarten* representative is limited and can be performed by co-workers.[88] Indeed, an employer can benefit from coworker representatives even if they lack special skills or knowledge. Their mere presence and moral support may calm the employee's nerves so as to enable the employee to describe the incident more accurately, thereby aiding the employer's discovery of the truth.[89] This is especially true in the case of unrepresented employees, since their employment is more vulnerable and they are likely to be more apprehensive.

But even assuming a coworker would be less effective than a union representative, this should not weigh against Section 7 coverage. As the Board explained in *Epilepsy Foundation*, Section 7 rights do not turn on the skills or abilities of the participants.[90] Nor does protection depend on the efficacy of the concerted action.[91] To withhold representation at investigatory interviews from unrepresented employees on the basis that they might not benefit as much as unionized employees is therefore unwarranted. In any event, the Board should not deny employees the exercise of a Section 7 right based on a generalized, somewhat paternalistic assumption that the right will be of limited value.[92]

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[87] *Id*. at 3, 5-7.

[88] 262 NLRB at 1015.

[89] *See id*.

[90] 331 NLRB at 679. *See also IBM*, 341 NLRB at 1308 (Members Liebman and Walsh, dissenting).

[91] 331 NLRB at 679 n.12.

[92] *See Materials Research,* 262 NLRB at 1015 ("We would not substitute our judgment for that of employees who have shown that they believe that the presence of a coworker lends a measure of meaningful protection.").

3. *IBM*'s concern over employer confidentiality interests is unpersuasive and out of step with current Board law

The *IBM* majority's fourth policy consideration for treating unrepresented employees differently from unionized employees—that a coworker representative may compromise the confidentiality of information—is likewise unavailing. As the dissent amply explained, there is no rational basis for believing that a union representative's duty of fair representation would safeguard the *employer's* interest in confidentiality, since that duty runs to *employees*.[93] In addition, we note that a union representative's interest in maintaining an amicable relationship with the employer is not meaningfully distinguishable from that of a coworker, contrary to *IBM*'s suggestion otherwise.[94] A coworker has at least as strong an interest in maintaining an agreeable relationship with the employer, if not stronger, since [redacted] employment is dependent on the employer and [redacted] is likely an at-will employee without the benefit of a grievance-arbitration procedure. If an employer lawfully imposes a non-disclosure requirement on participants in the investigation, it seems unlikely that a coworker would jeopardize [redacted] employment by violating such a rule. Thus, coworkers are not more likely to divulge sensitive information where discretion is required.

More importantly, recently the Board has recognized that an employer's general confidentiality interests must not be allowed to presumptively trump employees' Section 7 rights regarding disciplinary investigations. Thus, in *Banner Estrella Medical Center*,[95] the Board held that an employer may restrict employee discussions about ongoing disciplinary investigations only where it shows a legitimate and substantial business justification that outweighs employees' Section 7 rights.[96] Under this standard, an employer must assess its confidentiality needs on a case-by-case basis and demonstrate objectively reasonable grounds for believing that confidentiality is necessary to protect the integrity of an investigation.[97] Generalized concern about safeguarding the integrity of investigations is insufficient to outweigh employees' Section 7 rights.[98] Given the

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[93] *IBM*, 341 NLRB at 1309 (Members Liebman and Walsh, dissenting).

[94] See *id.* at 1293.

[95] 362 NLRB No. 137 (June 26, 2015).

[96] *Id.*, slip op. at 2.

[97] *Id.*, slip op. at 3.

[98] *Id.*, slip op. at 4.

Board's recognition of the rights of employees to discuss ongoing investigations, it is incongruous to maintain a policy that denies representation to unrepresented employees in such investigations in each and every case out of deference to generalized confidentiality interests.[99]

Moreover, such a policy makes little practical sense. In cases where an employer is not justified in banning discussions of investigations, the accused would be entitled to discuss the substance of the interview with [redacted] coworkers immediately after it ended. Thus, the employer gains very little by excluding a coworker witness from the interview itself. And in cases where a ban would be justified, the employer can lawfully prohibit both the accused and [redacted] representative from speaking about the investigation with others, upon pain of discipline. Thus, *IBM* should be abandoned in favor of a more balanced approach that gives due regard to employees' Section 7 interests.

4. Extending *Weingarten* rights is consistent with the prerogative of non-union employers to deal with employees on an individual basis

The *IBM* majority's concern that extending the *Weingarten* right to unrepresented employees interferes with a non-union employer's right to deal with such employees on an individual basis is also misdirected. It is, of course, unlawful for a unionized employer to bypass employees' chosen representative and engage in so-called "direct dealing" by making offers regarding terms and conditions directly to the employees.[100] The corollary is also true—non-union employers do not violate the Act by dealing with employees individually regarding their terms and conditions of employment. And as the Board held in *Charleston Nursing Center,* non-union employers do not infringe on employees' Section 7 rights by refusing to deal with their employees except on an individual basis.[101]

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[99] Assigning greater weight to employees' Section 7 interests compared to generalized concerns about confidentiality would also be congruous with the Board's recent decision to demand a more particularized showing of confidentiality concerns in the context of union requests for witness statements. *See Piedmont Gardens*, 362 NLRB No. 139, slip op. at 1-6 (June 26, 2015) (overruling the blanket exemption for witness statements in favor of case-by-case balancing of an employer's confidentiality interests and the union's need for the information).

[100] *See, e.g.*, *Central Management Co.*, 314 NLRB 763, 767 (1994) (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-85 (1944)).

[101] 257 NLRB 554, 555 (1981) (employer lawfully refused to meet with unrepresented group of employees about pay raise because "generally an employer is under no obligation to meet with employees or entertain their grievances upon request where

Recognizing *Weingarten* rights for unrepresented employees is consistent with these principles of law. Investigatory interviews do not entail exchanges of proposals. Indeed, it is well-established that employers have no duty to bargain in such interviews.[102] Thus, the *IBM* majority's concern that enabling coworker representation would "forbid" an employer from dealing with employees individually about their terms and conditions of employment misses the mark, since such discussions are outside the scope of the investigatory interview.[103] In addition, coworker representation at such interviews does not force the employer to deal with employees on a group basis in the sense envisioned by the Board in *Charleston Nursing Center*.[104] Unlike the situation where employees present grievances to their employer, it is the employer who demands the meeting in the case of an investigatory interview. Moreover, the employer can elect to forego the interview if the employee insists on representation, thereby invoking its prerogative to refuse to deal with employees on a "group" basis. Thus, extending *Weingarten* rights to unrepresented employees is consistent with the unique prerogatives of non-union employers recognized by the Board, contrary to concerns raised in *IBM*.

5. The industrial and societal changes relied on in *IBM* do not provide a compelling rationale for withholding *Weingarten* rights from unrepresented employees, and *IBM* imprudently discounted other changes that support the extension of such rights

The *IBM* majority 's reliance on certain industrial and societal changes—namely, employers' increased need to conduct investigations because of the rise in workplace violence, increased incidents of corporate abuse, legal obligations regarding workplace harassment, and post-September 11 terrorism threats—as reasons for a reversal of *Epilepsy Foundation* is neither well founded nor supported by any empirical evidence. For one, the *IBM* majority failed to consider that the greater need for workplace investigations not only strengthens employers' interests, but also those of employees in having some measure of protection. Moreover, none of these societal changes warrants a blanket denial of *Weingarten* rights for unrepresented employees. These trends are not usually even relevant to run-of-the

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there is no collective-bargaining agreement with an exclusive bargaining representative requiring it to do so").

[102] *See Weingarten*, 420 U.S. at 259-60.

[103] 341 NLRB at 1292.

[104] This related argument was raised by Member Schaumber in his concurrence. *Id.* at 1298.

mill investigations into employee misconduct. In addition, as the dissent explained, to the extent these changes demand greater confidentiality in particular investigations, such concerns can be accommodated on a case-by-case basis. Indeed, as explained above, this is how the Board has approached confidentiality concerns in the context of employee discussions of ongoing investigations. We are unaware of any evidence that this case-by-case approach has compromised the integrity of employer investigations in any respect, let alone so as to warrant a blanket rule against coworker representation.

As commentators have noted, the *IBM* majority's reliance on these changed societal conditions is fraught with difficulties.[105] First, the commentators point out that these purported "changes" do not really represent new phenomena. In this regard, employers have had a legal obligation to address discrimination and harassment complaints for decades.[106] The nation has experienced equally "'troubled times'" in the past, yet this was not taken into account in earlier Board decisions.[107] And workplace homicides actually declined in the years leading up to *IBM*.[108] Second, practically speaking, withholding representation from employees under investigation is an ill-suited response to the problems of terrorism, workplace violence, and corporate malfeasance. In this regard, responsibility for investigating and punishing perpetrators of terrorism and violent crimes rests with law enforcement agencies, not employers.[109] Moreover, isolating employees and withholding moral support during investigatory interviews may be

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[105] *See* Sarah Helene Duggin, *The Ongoing Battle over* Weingarten *Rights for Non-Union Employees in Investigative Interviews: What do Terrorism, Corporate Fraud, and Workplace Violence Have to Do With It?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655, 661, 691-717 (2006) ("The Board's *IBM Corporation* ruling reflects an ill-considered and dangerous decision to restrict important safeguards in the name of enhanced security—both physical and economic—without any critical analysis of the legitimacy or efficacy of doing so."); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 32-34 (2006) ("the rationale of changed conditions and increased need for workplace investigations rings hollow"); Christine Neylon O'Brien, *The NLRB Waffling on* Weingarten *Rights*, 37 LOY. U. CHI. L.J. 111, 142 (2005) ("[*IBM*] was not supported by persuasive rational reasons").

[106] *See* Corbett, *supra* note 105, at 32-33.

[107] Duggin, *supra* note 105, at 699-703 (quoting *IBM*, 341 NLRB at 1294).

[108] *See id.* at 704-05 & n.284.

[109] *See id.* at 703-07.

counterproductive and tend to incite violent outbursts.[110] In addition, as the *IBM* dissent also pointed out, corporate wrongdoing is an executive-level problem that is not connected to the due process rights of line employees.[111]

As one commentator has noted, there is a much more relevant change in the workplace in recent years—the vast majority of American workers, particularly in the private sector, do not belong to a union. Thus, "most of the country's workers are susceptible to the very problems that *Weingarten* rights help to mitigate," i.e. "the unfair imposition of disciplinary sanctions."[112] This change presents a much more compelling argument for extending the *Weingarten* right to the non-unionized workplace than any of the *IBM* majority's arguments for restricting it to unionized workplaces.

Finally, the *IBM* majority disregarded the relevance of the increasing prevalence of alternative dispute resolution mechanisms in the workplace on the grounds that such systems are voluntary. In *Weingarten* itself, the Supreme Court pointed to the fact that many collective-bargaining agreements incorporate a right to union representation at investigatory interviews in finding that such a right comported with industrial practice. These contract provisions are equally voluntary, since there is no duty to agree to any particular proposal in bargaining.[113] Thus, the Board should take into account the rise in ADR and the concomitant "evolving norm of fairness and due process" as supporting a *Weingarten* right in non-union settings.[114]

6. The Employer violated Section 8(a)(1) by insisting that the Charging Party attend the HR meeting alone

Recognizing that unrepresented employees enjoy an equal right to representation at investigatory interviews, it follows that the Employer infringed on that right by forcing the Charging Party to attend the HR meeting without the assistance of [redacted] coworker. The Charging Party was entitled to invoke [redacted] right to representation because [redacted] reasonably perceived that the meeting might lead to

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[110] *See id.* at 708-09.

[111] *See IBM*, 341 NLRB at 1305 (Members Liebman and Walsh, dissenting); Duggin, *supra* note 105, at 709-10.

[112] Duggin, *supra* note 105, at 714.

[113] *See NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401-04 (1952) (citing Section 8(d)).

[114] *IBM*, 341 NLRB at 1310 (Members Liebman and Walsh, dissenting).

discipline. In this regard, [redacted] was aware that the Employer was planning to question [redacted] about patient complaints, which is part of the Employer's admitted procedure in investigating such incidents in contemplation of discipline. Also, the Charging Party reasonably feared discipline based on the HR Vice President's statement that the Employer was building a case against [redacted] Once an employee makes a valid request for representation, the employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee a choice between continuing the interview without a representative or having no interview.[115] Thus, it was unlawful for the Employer to bar the coworker from the HR meeting and to proceed with questioning without giving the Charging Party the option of foregoing the interview.

7. Make-whole relief is the appropriate remedy in the circumstances of this case

The Board recently determined that a make-whole remedy is appropriate for *Weingarten* violations where: (1) the discharge decision was based, at least in part, on the employee's misconduct during an unlawful interview; and (2) the employer cannot demonstrate that it would have discharged the employee absent that purported misconduct.[116] Here, the Employer purportedly relied on both the Charging Party's behavior during the HR meeting as well as [redacted] prior protected concerted activities of organizing fellow nurses around group complaints and presenting complaints to management as an outgrowth of those discussions. Since the Employer relied on misconduct occurring in the investigatory interview, and the second basis for the discharge is unlawful, we conclude that the Charging Party is entitled to make-whole relief.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by refusing the Charging Party's request for a coworker to accompany [redacted] at the HR meeting, and it should seek make-whole relief to remedy this violation.

/s/
B.J.K.

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[115] *See, e.g.*, *Menorah Medical Center,* 362 NLRB No. 193, slip op at 2 (Aug. 27, 2015).

[116] *E.I. DuPont de Nemours & Co.*, 362 NLRB No. 98, slip op. at 4 (May 29, 2015).